Supreme Court, U.S.
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No. 93-1168

In The

Supreme Court of the United States

October Term, 1993

RONNIE WAYNE OWEN,

Petitioner,

vs.

CHEVRON, USA, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Fifth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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MAY IT PLEASE THE COURT:

This reply is respectfully submitted in response to the Opposition to the Petition for Certiorari filed by respondent, Chevron, USA.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

Respondent asserts that this Court has denied certiorari on the question presented herein in four previous cases, citing *Alexander v. Chevron, USA*, 806 F.2d 526 (5th Cir.), *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987), *Capps v. N.L. Baroid-Industries, Inc.*, 784 F.2d 615 (5th Cir.), *cert. denied*, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986), *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir.), *cert. denied sub nom., Gulf Oil Corp. v. Dano & Curole Marine Contractors, Inc.*, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986), and *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 783, 112 L.Ed.2d 846 (1991). This is simply not true. In only two of the cited cases was the issue raised herein before the Court; the other two cases presented entirely different questions.[1]

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[1] In *Alexander v. Chevron*, the exact question presented was as follows: "Have the 1984 Amendments to the Longshoremen's and Harbor Worker's Compensation Act abrogated the 'borrowing employer' defense to tort suits by injured employees of subcontractors, in cases where compensation benefits are paid by the employee's direct employer?" A similar question was raised in *Capps v. N. L. Baroid-Industries, supra.* The question presented in *Peter v. Hess Oil Virgin Islands Corp., supra*, was as

In any event, this Court

> has often stated [that] "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed.2d 361 (1923) (Holmes, J.). Accord, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1, 93 S.Ct. 637, 650, n.1, 34 L.Ed.2d 577 (1973); *Brown v. Allen*, 344 U.S. 443, 489-497, 73 S.Ct. 397, 437-441, 97 L.Ed.2d 469 (1953). The "variety of considerations [that] underlie denials of the writ," *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917, 70 S.Ct. 252, 254, 94 L.Ed. 562 (1950) (opinion of Frankfurter, J.), counsels against according denials of certiorari any precedential value.

Teague v. Lane, 489 U.S. 288, 296, 109 S.Ct. 1060, 1067-68, 103 L.Ed.2d 334 (1988). Among the various considerations that might prompt this Court to deny writs are the particular facts from which an otherwise cert-worthy question arises, *Patton v. Yount*, 467 U.S. 1025, 1053, 104 S.Ct. 2885, 2899, 81 L.Ed.2d 847 (1984) (Stevens, J., dissenting) ("The answer to the question why the Court grants certiorari in

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follows: "Does Section 905(a) of the Longshoremen's and Harbor Worker's Compensation Act preempt a maritime worker's state or territorial tort action against his 'borrowed employer' for injuries occurring in the 'twilight zone' of concurrent state and federal jurisdiction, where the relevant state or territorial compensation statute does not incorporate any borrowed servant doctrine and does not grant immunity from tort suit to a maritime worker's borrowed employer?" *Gulf Oil v. Dano & Curole Marine, supra*, raised only indemnity questions in an application for certiorari filed by the very party who was found to be the "borrowing employer" by the lower courts.

any given case usually involves considerations of both fact and law"), or that the issue present, while otherwise deserving of this Court's attention, is simply not ripe for review. *Darr v. Burford*, 339 U.S. 200, 227, 70 S.Ct. 587, 601-02, 94 L.Ed. 761 (1950) (Frankfurther, J., dissenting) ("[P]etitions have often been denied because . . . the issue was either not ripe enough or too moribund for adjudication. . . . ").[2] The decision to deny a writ at any given time is not dispositive of whether the issue should be addressed by this Court at another time, because the "numerous factors" that are involved in a decision on a petition for certiorari, *Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974), are subject to change. Thus, this Court will grant certiorari to review a question previously not considered worthy of certiorari when intervening circumstances convince the Court that the issue should now be addressed. *See e.g., Skidmore v. Swift & Co.*, 322 U.S. 723, 64 S.Ct. 1256, 88 L.Ed. 1561 (1944). As Justice Brennan has observed, "[t]he Court may very well take the very next case raising the same question and reach a different result on the merits." Brennan, J., *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn Q. 393, 402-03 (1960).[3]

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[2] Justice Jackson, concurring, once observed that "neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari." *Brown v. Allen*, 344 U.S. 443, 542, 72 S.Ct. 31, 428, 97 L.Ed. 469 (1953).

[3] *See generally* Memorandum of Justice Frankfurter in *Elgin, Joliet & Eastern Ry. Co. v. Gibson*, 355 U.S. 897, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957) ("Although the Court has definitely decided that a denial of a petition for certiorari carries no legal significance, *Brown v. Allen*, 344 U.S. 442, 489-97 (1953), the bar, in

II.

Respondent has convincingly made a case that the rule in the Fifth Circuit, now adopted by the Third Circuit, is, has, and always will be that a "borrowing employer" automatically gets tort immunity under the Longshoremen's and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, regardless of whether that "employer" pays, or is even liable for, compensation benefits. Respondent has conclusively demonstrated that the Fifth Circuit will, under no circumstances, change this rule, or even re-examine the question, and that other circuit courts are likely to join the Fifth. Respondent proves unequivocally that only intervention by this Court can prevent this result.

III.

Respondent all but concedes that the "borrowed servant" defense is totally contrary to the express terms of LHWCA § 905(a), as amended in 1984. It has not even so much as offered this Court *one* explanation as to how the latter leaves *any* room for the former, except to repeat the Fifth Circuit's contention that borrowed employees are not "deemed," but rather *are*, the employees of their borrowing employers. *See* Opposition, at 9 n.5. This game of semantics ignores the jurisprudence of this Court

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briefs, and lower courts, in their opinions, continue to note such denials by way of reinforcing the authority of cited lower court decisions. It has therefore seemed to me appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion.").

which does not recognize such cavils. *See Kelly v. So. Pac. Co.*, 419 U.S. 331, 330, 95 S.Ct. 472, 479, 42 L.Ed.2d 498 (1974) (emphasis added), holding that when the conditions of borrowed employment are met, the "employees can be ***deemed*** *pro hac vice* employees" of the borrower.[4] The Fifth Circuit's misapplication of § 905(a) of the LHWCA as amended in 1984 in and of itself justifies certiorari because it does significant violence to the operation of the entire compensation scheme as envisioned by Congress.[5] It grants to the borrowing employer an immunity for which no *quid pro quo* is exchanged, and robs the injured victim of tort recovery with no substitute relief, the very situation created by this Court's decision in *Washington Metropolitan Area Transit Authority v. Johnson*,

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[4] Respondent also makes much of the 1984 amendment's use of "contractor" in § 905(a), another specious distinction since respondent has never denied that it was operating as a general contractor when it hired petitioner's employer. In any event, the selection of the word "contractor" by Congress is easy to explain. By this term, Congress meant to designate any person or entity who is not a direct employer, but who has contracted with another to procure services offered by the other's employees, an arrangement usually involving an "independent contractor." Congress' use of "contractor" in § 905(a) cannot be reconciled with the "borrowed servant" defense because the latter makes contractors (those hiring independent contractors) "employers" under conditions other than the *sole* criteria allowed by 905(a).

[5] *See e.g., United States v. Ruzicka*, 329 U.S. 287, 287, 67 S.Ct. 207, 207, 91 L.Ed. 290 (1946) (certiorari granted because of the significance of the issue in the administration of the statute); *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 298, 67 S.Ct. 271, 271, 91 L.Ed. 296 (1946) (certiorari granted because the lower court's ruling was a serious hindrance to effective administration of the law).

467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984), and which Congress in no uncertain terms rebuked in its 1984 amendment.[6]

IV.

Respondent does not dispute that even the Fifth Circuit itself has recognized the utter irreconcilability of the "borrowed employee" defense with the 1984 amendment to the LHWCA, and would have itself abandoned the defense had it been free to do so. *See Doucet v. Gulf Oil, supra*, 783 F.2d at 523.[7] This again counsels toward a grant

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[6] Respondent contends that the 1984 amendment was designed to do nothing more than reverse *Washington Metropolitan Area Transit Authority*, but ignores the fact that the principal underpinning that case and the Fifth Circuit's application of the "borrowed employee" defense are identical – the granting of tort immunity to one who does not actually pay compensation benefits. Indeed, the Fifth Circuit's rule is an even greater affront to the expressed intent of Congress because it grants immunity to one who is not even liable for compensation benefits, even as a guarantor! It was this principle, the granting of immunity without any reciprocal benefit received by the victim, that Congress addressed in its 1984 amendment. Had Congress wished to confine its expression to *only* the *Washington Metropolitan Area Transit Authority* case, it could have drafted far narrower language that would have limited its action to that solitary result. It did not.

[7] Respondent suggests that the Fifth Circuit's refusal to consider the question *en banc* suggests unanimity on the part of the court. To the contrary, it could signify nothing more than the Fifth Circuit's refusal to change its rule unless receiving an instruction from a higher authority. Indeed, one circuit has stated that it will not hear a case *en banc* if it is "of such extraordinary importance that we are confident the Supreme Court will accept [the] matter under its certiorari jurisdiction."

of certiorari. *See e.g., Dickson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508, 70 S.Ct. 322, 322, 94 L.Ed. 299 (1950) (certiorari granted "because of this intracircuit conflict"); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181, 60 S.Ct. 221, 222, 84 L.Ed. 176 (1939) (certiorari granted because of intracircuit conflict and the importance of the question); *Maggio v. Zeitz*, 333 U.S. 56, 59-60, 68 S.Ct. 401, 403, 92 L.Ed. 476 (1948) (certiorari granted because of differing views within a circuit that was most frequently confronted with the problem).

V.

Respondent asks this Court to leave undisturbed the Fifth Circuit's practice, even though almost admittedly indefensible, because there is no conflict in the circuits. However, the precise rule at issue is largely limited to cases arising in waters off the coast of Texas, Louisiana, or Mississippi, all under the Fifth Circuit's jurisdiction. It may well be that a conflict will never arise simply because no court may be given the opportunity to consider the question. In the meantime, injured victims whose cases are bound for the Fifth Circuit continue to be denied tort recovery by a defense that is directly contrary to the express terms of § 905(a) of the LHWCA, with no *quid pro quo* given in exchange for the recovery that they have been forced to surrender. Congress never intended that LHWCA tort immunity be doled out gratuitously, with nothing given in exchange. This much is absolutely

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Green v. Santa Fe Ind., Inc., 533 F.2d 1309, 1310 (2d Cir. 1976), *rev'd*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977).

certain from the 1984 Amendments to §§ 904 and 905. The Fifth Circuit's "borrowed employee" rule is directly contrary to the letter and spirit of the LHWCA. If the Court does not intervene, the Fifth Circuit will continue to repeatedly deny tort recovery to "borrower" employees who receive absolutely nothing in exchange for the right to compensation stolen from them. This perversion of one essential fundament underpinning the LHWCA – *quid pro quo* – presents an important question of federal law worthy of this Court's attention.

CONCLUSION

For the reasons expressed above, petitioner, Ronnie Wayne Owen, respectfully requests this Court to grant certiorari in this case.

Respectfully submitted,

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